United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NATIONAL CARBON COMPANY, a Corporation,

Appellant.

vs.

ALASKA STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "EUREKA," her Engines, Boilers, Tackle, Apparel, Furniture, etc.,

Appellee.

PETITION FOR REHEARING.

PLATT & PLATT,

Proctors for Appellee.

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Petitions for rehearing are not infrequently looked upon, as purely perfunctory in character.

When an appellate court has carefully reviewed

the facts and rules of law involved in any controversy, its final decision should be looked upon with respect.

When, however, the record, brought before such a court, presents an intricate and lengthy statement of facts, and the court erroneously reads such statement, it becomes the duty of the practitioner, as a member of such court, to direct its attention to the error.

The practitioner's duty in this particular is emphasized in those instances where the proceeding in the appellate court is a new trial.

The Supreme Court of the United States has recognized the importance of such a situation, and has even gone so far as to allow a second petition for rehearing to be filed, in an instance where a first petition for rehearing had already been denied.

This happened in the case of American Emigrant Company vs. County of Adams, 100 U. S. 61.

The application, in that case, for a second petition for rehearing, was made by the famous lawyer, Benjamin F. Butler.

At the time of making such application, the Chief Justice of the United States asked General

Butler if he was aware of the fact that a petition for rehearing had already been presented and denied. This question was answered by General Butler in the affirmative.

Thereupon, the Chief Justice interrogated General Butler as follows:—

> "How many rehearings do you think ought to be permitted by the court in a given case?

To this inquiry General Butler replied:—

> "In the abstract, as many hearings as are necessary to establish the truth and justice of the case; in the concrete, as many as any gentleman fit to practice at your bar will peril his reputation by asking for."

It is interesting to note that General Butler's petition for a second rehearing was granted, and upon such rehearing, the Supreme Court of the United States unanimously reversed its first decision.

We, therefore, suggest that the granting of a rehearing, and a change of opinion, is not any evidence of weakness.

The opinion filed, in the case at bar, premises its final conclusion upon a brief review of the facts surrounding the shipment in controversy.

It will be remembered that on or about the 16th day of September, 1915, the Steamship "Eureka" set sail from the Port of Philadelphia for the Port of San Francisco, California, by the way of the Panama Canal.

It had on board, as part of a mixed cargo, certain shipments of dry cells, belonging to the National Carbon Company.

The bill of lading prescribed that the goods were to be taken by the Panama Canal route only.

On September 28th, 1915, the steamship reached the Atlantic entrance of the Panama Canal, but was prevented from passing through such canal on account of slides which had taken place therein.

The ship waited at the Atlantic entrance to the Panama Canal until November 4th, 1915, relying on advices from the United States Government that the canal would probably be reopened within a reasonable time.

On November 4th, 1915, the ship set sail for the Port of New Orleans, and there delivered to the National Carbon Company, its part of the cargo in question.

The National Carbon Company claims that it made a demand upon the agents of the steamship for a delivery of its cargo at the Port of Colon, and that such delivery was refused, to the damage of the National Carbon Company.

The decision of this court, after reviewing such facts, concludes with the statement that, in its opinion, the firm of L. Rubelli's Sons, upon whom the alleged demand was made, acted directly for the Shipping Company, and that the ship is liable for the damages by detention after refusal to deliver the goods at the Port of Colon.

While the conclusion of the court upon the question of general agency directly contradicts the statements contained in the letters which were offered in evidence by the National Carbon Company itself; and while such conclusion directly contra-

dicts the admissions of Mr. Mitchell, the Traffic Manager of the National Carbon Company, contained in his letter of October 25th, 1915; and while this conclusion directly contradicts the language contained in the letter of October 22nd, 1915, written by L. Rubelli's Sons, which this court has cited in support of the theory that L. Rubelli's Sons were general agents, whereas the letter itself denies, "any responsibility whatsoever for the actions of the steamer, her owners, charterers, or the Oregon California Shipping Company of Portland, or others concerned," and further states that the National Carbon Company had entered into an independent arrangement with the firm of L. Rubelli's Sons; nevertheless, we are compelled to accept this court's finding of fact on the question of agency.

On the other hand, we respectfully, but emphatically contend, that the court's legal conclusion of liability, based upon such assumed finding of fact, is unsupported by authority, and incorrectly assumes a state of facts not proven.

For example, on page 6 of the opinion filed in this case appears the following language:—

> "There were a number of ships plying between Colon and New

York upon some of which freight room could have been obtained."

We respectfully suggest that the record in this case establishes the contrary fact.

The evidence was as follows:—

Mr. Charles Kurz was one of the witnesses placed upon the stand by the National Carbon Company itself.

He is the man upon whom it is claimed that a demand for the delivery of the cargo at Colon was made.

It is this demand upon which the present proceeding is based.

It is this demand upon which the opinion of the court rests, and yet, this very gentleman testified, while upon the stand, as a witness for the National Carbon Company, that all efforts to procure a transhipment of this cargo were futile.

The proctors for the appellee in this case enumerated to Mr. Kurz the various transportation lines which were interviewed, in an endeavor to

procure a transhipment of the cargo, and the National Carbon Company, through its proctors, had full and ample opportunity to correct, upon redirect examination, any discrepancy in Mr. Kurz' testimony, but not a single effort was made in this particular.

This testimony of Mr. Kurz appears upon pages 142, 143, and 144, of Libelant's Printed Exhibit No. 1, filed as part of the record in this case, and reads as follows:

> "Q. Mr. Kurz, when the slide at the Canal continued after the arrival of the vessel for some little time, it is a fact, is it not, that your firm as well as the Oregon-California Shipping Co., at Portland, made a thorough investigation of all possible and practicable methods of dispatching the boat or cargo to the points of destination?
>
> Same objection.
>
> A. Our firm did, I don't know what the people on the Pacific Coast did.

Same motion.

Q. Now, in addition to the disclosures as to those efforts made by your firm, as shown by the exhibits heretofore put in evidence, by the libelant, your firm endeavored to arrange transshipment across the canal and transportation up the west coast with other carriers, did it not?

A. Yes.

Q. Among others, the Duluth Steamship Company, the Pacific Mail Steamship Company, the American - Hawaiian Steamship Company, the Atlantic & Pacific Transportation Company, the Luckenbach Steamship Company, the Panama Pacific Line at New York, the owners of the Edison Line at Boston, the Alaska Steamship Company, and Olsen & Mahoney?

A. Yes.

Mr. WELLES: Objected to, and

I move that the question and answer of the witness with respect to what was done for the forwarding of cargo other than libelant's be stricken out on the ground that it is incompetent, irrelevant and immaterial under the issues in this case.

Q. And as to your efforts with all of the transportation companies named in the last question as well as those named in the various exhibits placed in evidence by the libelant, you were unable to arrange for the forwarding of the cargo by rail either across the Isthmus or via the Tehuantepec Railroad because of the lack of carriers on the Pacific Coast to take the goods at the point of discharge on the Pacific side?

A. That is right, up to the time I got to Portland.

Same objection.

(By Mr. WELLES.)

Q. When did you get to Portland?

A. I arrived at Portland about November 1st.

Q. You were there only four or five days before the vessel came back?

A. Yes.

(By Mr. PLATT.)

Q. In addition to the efforts to arrange the transhipment of the cargo across the Isthmus and up the west coast, which proved impossible, for the reasons that you have already stated, investigation was made as to the taking of the vessel and cargo to the west coast through the Straits of Magellan, was there not?

A. Yes, sir.

Same objection.

Q. And the same had to be abandoned, is it not a fact, be-

cause being an oil-burner there was no supply of fuel oil on the east or west coast of South America to make it safe for her to make the trip?

A. That is right."

In addition to the above, Mr. Anson J. Mitchell, the Traffic Manager of the National Carbon Company testified, as a pure conclusion, that if the goods had been unloaded at Colon, they could have been transhipped back to the United States by other routes.

This testimony appears upon page 25, of Libelant's Printed Exhibit No. 1, and was as follows:

"Q. If those goods had been unloaded at Colon could they have been brought to the United States by other routes?

Mr. PLATT.—Objected to on the ground that the witness has

not shown that he knows anything about that.

A. They could have been."

As against this statement, which was a pure conclusion, Mr. Mitchell testified on cross examination that he had made no definite arrangements for the transhipment of this cargo, and that the only knowledge which he possessed as to the possibility of transhipment, was made up of opinions which had been expressed to him by certain steamship companies.

This testimony appears on pages 185 and 186 of Libelant's Printed Exhibit No. 1, and was as follows:

"Q. Were you ever at Colon?

A. Never.

Q. Had you made arrangements with any carrier then having a boat at Colon whereby that carrier had contracted with the

libelant to handle that portion of the cargo of the S. S. 'Eureka' which was shipped by the National Carbon Company, during any time that the steamship 'Eureka' was detained at the east side of the Panama Canal?

Mr. WELLES.—Objected to as incompetent, irrelevant and immaterial upon the issue in this action.

A. I had an arrangement with —I won't say an arrangement,— I had talked the matter over with a representative of the Panama Pacific Line, the Panama Steamship Company, the American-Hawaiian Company, and also the Luckenbach people, and they told me that there would be no question in their minds but what I could make satisfactory arrangements to have the goods brought back to New York.

Q. What you have stated in reply to the last question, comprised, did it not, all of the arrangements that you had made at

any time during the time that the 'Eureka' was detained at Colon, on the east side of the Panama Canal, for the handling of that portion of her cargo which had been shipped by the National Carbon Company?

Same objection.

A. Yes."

It further appears from the testimony of Mr. Kurz, that the Government of the United States would not permit the unloading of vessels detained at either entrance to the Canal, unless the parties so unloading had made definite arrangements to immediately tranship the cargo.

This testimony is very vital, and very important, and seems to have been entirely overlooked by this court.

It was as follows:—

"Q. It is a fact, is it not, that the government would not permit

the unloading of vessels detained at the Canal, either on the west coast or the east coast, unless the parties so unloading had definite arrangements made and carriers ready to take the cargoes when so unloaded?

A. It is."

(Libelant's Printed Ex. 1, pages 144, 145.)

The above testimony comes from the lips of the appellant's own witnesses.

The importance of the above evidence cannot be overestimated.

The court must take judicial notice of the fact, that the Port of Colon was a comparatively new port, from the standpoint of shipping on a large scale, and that the facilities for discharging cargo were, therefore, limited.

For this reason, and in order to prevent the ac-

cumulation of large quantities of cargo, the government of the United States was compelled to adopt a rule, requiring all carriers to have a definite arrangement for the transhipment of cargo, before they were allowed to discharge the same at the Port of Colon.

The government could not permit a carrier to discharge cargo, and then, when the discharged cargo was not immediately removed, say to the government, that, "we had an arrangement for transhipping the cargo, but such arrangement has fallen through."

The government regulation, as shown by the above evidence, required that "definite arrangements" must be made, and carriers must be in readiness the moment cargo was unloaded so as to immediately tranship the same.

The National Carbon Company admits that it had no "definite arrangement."

If the Oregon California Shipping Company had actually conformed to the alleged demand of the National Carbon Company for a delivery of its cargo at the Port of Colon, the government of the United States would have immediately intervened and prohibited the carrier from making such a discharge of cargo, unless it could show that definite arrangements for its transhipment had been made.

The record in this case discloses by the above evidence, that no definite arrangement for the transhipment of this cargo had been made.

This is not a strained or technical construction of this evidence, but a straightforward statement of the facts disclosed by the record.

Suppose the Oregon California Shipping Company had conformed to the alleged demand of the National Carbon Company for a delivery of its cargo, and when the government asked it what arrangements it had made for transhipment, it had given in reply the very answer of Mr. Mitchell as above set forth, would the government have accepted such an answer as a satisfactory compliance with its order that definite arrangements must have been made, and carriers ready to take the cargo when unloaded?

While the answer to this question is obvious, we respectfully urge the court not to overlook the importance of the situation.

We respectfully contend, that when this evidence is read in the light of all the circumstances, and the actual and unambiguous meaning of its words is considered, it clearly establishes, that the steamship "Eureka" would have been prohibited from delivering to the National Carbon Company its cargo,

because no definite arrangements had been made for its transhipment.

This record positively shows that, a carrier was prohibited from discharging any portion of its cargo at the Port of Colon, **"unless the parties so unloading had definite arrangements made and carriers ready to take the cargoes when so unloaded."**

This same record likewise shows that the National Carbon Company did not have any definite arrangements for the transhipment of the cargo, and relied solely on hearsay information as to the possibility of transhipment.

This same record likewise shows that this indefinite hearsay information as to the probability of a chance to reship, constituted "all of the arrangements that the National Carbon Company had made at any time during the time that the "Eureka" was detained at Colon."

We respectfully contend that this is not an abstract or technical argument, but that the claim of the steamship "Eureka" in this particular is as just and equitable as any claim could possibly be.

If the National Carbon Company now seeks to establish a legal liability against the Steamship "Eureka," and to recover damages for injury to its

cargo arising out of the extraordinary occurrences which gave rise to this litigation, and seeks to base its claim upon the sole ground that it made a demand for a delivery of its cargo at the Port of Colon, it should certainly be compelled, as a matter of justice and right, to show that the Steamship "Eureka" could have conformed to such demand.

On the contrary, the very record which the National Carbon Company has presented to this court in support of its claim, establishes positively, that the steamship could not have conformed to the demand, because the National Carbon Company itself had not made any definite arrangements for the transhipment of the cargo.

The Act of Congress of February 13th, 1893, commonly known as "The Harter Act," expressly exempts a ship where the loss is attributable, directly or indirectly, to any act or omission of the shipper or owner of the goods.

The exact language of the act is as follows:—

"* * * Or for loss resulting from any act or omission of the

shipper or owner of the goods, his agent or representatives."

27 Stat. L. 445.

The appellant's own record positively shows that it omitted to make definite arrangements for the transhipment of its cargo before making its demand upon the Steamship "Eureka."

The same record likewise shows that such a definite arrangement was required by the United States Government, as a condition precedent to the right to discharge any cargo at the Port of Colon.

The opinion rendered by this court recognizes that the mere making of a naked demand for delivery at Colon would not be sufficient to impose a liability upon the steamship, and, therefore, suggests that there were other ships plying between Colon and New York, and that if the goods had been placed upon such ships, the damage in question would have been avoided.

This very opinion recognizes, in other words, that the National Carbon Company must not only show that it made a demand, but must, likewise,

show that such demand could have been complied with, and concludes that this requirement is satisfied by the inference that there were other ships plying between Colon and New York.

The government requirement, however, as shown by the above evidence, made it necessary for the shipper to establish, as a condition precedent to the right of discharging cargo, not merely that there were other ships plying between Colon and New York, but that there was a certain, specific, and definite vessel, at Colon, upon which vessel the goods could have been transhipped immediately after unloading.

The shipper must show, in other words, that the loss or damage to the goods was directly caused by the failure to conform to the demand, and that such loss or damage was not in any way attributable to any omission upon the part of the shipper.

We respectfully contend, that the appellant's own record shows, that the shipper omitted to make any definite arrangements for the transhipment of its cargo, as required by the government regulations, and thereby made conformity to its demand impossible, or has at least shown to this court that it was impossible.

We are not seeking for a strained construction

of such testimony, or asking this court to make an inference from such testimony, but we are asking the court to consider the facts as they have been positively proved by the appellant, and to withdraw from its opinion the following statement:—

> "We think it evident, that if the goods had been delivered in Colon at that time, the damage would have been obviated, for there were a number of ships plying between Colon and New York upon some of which room could have been obtained."

If the above finding is withdrawn from the decision rendered in this case, there is no fact left upon which to base a legal liability against the steamship " Eureka."

The legal liability established by the decision rendered in this case, rests solely upon the alleged refusal of the owner to comply with the demand for delivery at Colon.

It is true that in the latter part of its decision,

this court concluded, "that if the ship had sailed from Colon about October 11th, when transhipment was advised by the master of the ship, the damage would have been avoided," but this language is so clearly opposed to the statement contained in the preceding paragraph, to the effect that, "libelant bases its action for damages not upon delay," that we may treat the latter language as dictum.

In view of the undisputed fact that the Government of the United States would not allow a discharge of cargo at the Port of Colon in the absence of an absolute guarantee of transhipment, and in view of the further undisputed fact that all efforts at transhipment were rendered futile by the absence of carriers, is it logical, equitable, or justifiable, to hold the steamship legally liable for failure to conform to an alleged demand, with which it was impossible to comply?

We venture the assertion, that in all the history of admiralty jurisprudence no case can be found in support of a theory, which has held a ship liable for failure to perform an act, the performance of which was prevented by governmental authority.

The case of "The Conventina," 52 Fed. 156, which was cited by this court in support of the liability which its opinion has imposed upon the

steamship "Eureka," is in no manner supportive of the rule laid down in the present case.

The case of "The Conventina," 52 Fed. 156 was a case wherein the vessel had been chartered by the owners.

After the cargo was shipped, a controversy arose between the owners and the charterers as to whether the ship was bound to touch at certain ports in Spain.

The charterers caused the vessel to be attached on a claim of damages for breach of charter, and she remained in custody forty days, until a reversal on appeal.

The owners were unable at first to procure the release of the ship.

After a period of forty days, a decree was entered by the appellant court in favor of the owners.

When the shipper libeled the ship for damages on account of delay, an attempt was made to excuse the delay of the ship under the exceptions contained in the bill of lading.

The court held that the detention by attachment did not come within the meaning of the ex-expression, "Restraint of Princes," etc.

The same court finally held that the shipper was a stranger to the controversy between the owners and charterers, and that the shipper could not be held accountable for the act of the owners in chartering the boat under the terms of a contract which made possible the controversy between the owners and the charterers, and that the shipper could not be held responsible for the act of the charterers in attaching the ship, which controversy arose out of the contract that had been made between the owners and the charterers.

The court further suggested, that when the controversy arose between the owners and the charterers, the owners might have reshipped the goods by another vessel.

We respectfully suggest that there is not a single point of analogy between the facts presented in the case of "The Conventina" and the facts presented in the case at bar.

Can it be said that the Oregon California Shipping Company was responsible for, or made possible, the slides in the Panama Canal?

Can it be contended that the owners of the steamship "Eureka" made possible the slides in the Panama Canal?

Can it be held that L. Rubelli's Sons made possible the slides in the Panama Canal?

Can it be contended that the master of the steamship "Eureka" made possible the slides in the Panama Canal?

These questions, of course, answer themselves, and it cannot even be contended, that the National Carbon Company was responsible for the slides in the Panama Canal.

It was to meet just such a condition that the bills of lading, issued for the cargo in the present controversy, contained provisions eliminating liability in event of an unforseen impediment to the voyage.

Is it fair or reasonable to hold, that all of the provisions of these bills of lading, which constitutes the solemn contract between the National Carbon Company and the steamship "Eureka," could be abrogated by the action of the national Carbon Company, in making a demand upon the steamship "Eureka" for a delivery of its cargo at the Port of Colon, in an instance where the detention of the ship at the Port of Colon was caused by an Act of God, over which none of the parties had any control, and in an instance where the ship itself was

prevented by governmental authority from discharging the cargo at the Port of Colon?

The only language found in the case of "The Conventina," which in any way bears upon the present controversy, is the statement, that in view of the uncertain litigation existing between the owner and the charterer and which both had made possible, a reasonable consideration of the shipper's interests required a transhipment of the goods by another vessel, or a notification to the shipper of the probable delay, and the privilege given such shipper to reship them.

This statement of an abstract rule of law by District Judge Brown, presupposes the possibility of transhipment, and was applied in a case where the delay of the ship was directly caused by the action of the owner and the charterer.

Can the application of such a rule of law, to such a state of facts, be adopted as a basis for establishing liability in the case at bar, where the admitted facts, proven by the shipper itself, show that the carrier made every possible effort to tranship the goods and was unable to accomplish such transhipment, and was furthermore prevented by the government from discharging its cargo in the absence of a guarantee of transhipment?

The case of "The Martha," 35 Fed. 313, has already been analyzed in the appellee's brief, in connection with the presentation of its case on appeal, and, as pointed out in such brief, the period of delay in the case of "The Martha" was absolutely fixed, by virtue of the fact that it took three months to procure the parts, necessary to enable "The Martha" to continue her voyage.

In the case of "The Martha," however, there was not a scintilla of evidence to show that a premature discharge of her cargo was rendered impossible by an Act of the Government or any other agency.

In that case, Judge Benedict directly held that the shipowner had offered no reasonable excuse of any kind for refusing a premature delivery of the cargo.

In the case at bar, the period of delay was a matter of continuing uncertainty, and the carrier has shown, as an excuse, for the non-delivery of the cargo at Colon, that the Government of the United States would not permit its discharge, in the absence of a guarantee of transhipment, which transhipment was impossible.

We, therefore, respectfully contend that neither the case of "The Conventina" nor the case of "The

Martha" is an authority in support of the appellant's position in the present controversy.

It has long been an establilshed rule of law that a carrier could by its bill of lading exempt itself from liability on account of damages arising from an Act of God.

The bills of lading, covering the shipments in controversy, contained the usual and stereotyped provisions in this particular, and further exempted the carrier from liability on account of all unforseen obstructions to the progress of the voyage.

Supplementing and confirming this long established rule of law, the Congress of the United States has adopted an Act which expressly relieves a shipper from responsibility for damage arising on account of an Act of God.

The language of this enactment is as follows:

> "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects sea-

worthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from the dangers of the sea or other navigable waters, acts of God, * * * * etc."

27 Stat. L. 445.

The above statute was by operation of law incorporated into the bills of lading covering the shipments in controversy.

It must certainly be admitted that the slides in the Panama Canal were "dangers of navigable waters", and "acts of God."

The rule contended for by the appellant in this case and adopted by this court, amounts to a hold-

ing that the effect of the above statute and the protection which such statute gives to a carrier, may be abrogated by the action of a shipper in demanding a premature delivery of his cargo whenever "a danger of navigable waters" or "an act of God" prevents the completion of the voyage.

It, likewise, premits a shipper to abrogate all the provisions of a bill of lading which protect the carrier from responsibility for unforseen difficulties.

The record in this case conclusively establishes the absence of any means for transhipping the cargo from Colon while the ship was there delayed.

The record in this case conclusively establishes that the Government of the United States would not allow the carrier to discharge any cargo at the Port of Colon, unless it would guarantee an immediate transhipment of such cargo.

The record in this case conclusively establishes that the slides in the Panama Canal prevented the steamship "Eureka" from continuing her voyage.

The record in this case conclusively establishes that the shipments in controversy were to be taken by the way of the Panama Canal only.

The statutes of the United States, which con-

stituted an element of the contract of affreightment between the parties in this controversy, expressly relieved the carrier from responsibility for damage occasioned by "dangers of the sea, or other navigable waters," or "acts of God."

Can it be that a shipper may go roughshod over such a statute and abrogate its effect, by making a demand for a premature delivery of its cargo in an instance where the carrier is unable to conform to such demand?

The reasonableness of the governmental order prohibiting the discharge of any cargo at the Port of Colon in the absence of a guarantee of immediate transhipment, can hardly be questioned.

If, fifty ships had been detained at the Atlantic entrance to the Panama Canal, on account of slides therein, and each of the shippers having cargo on the fifty ships had demanded a premature delivery of their cargo at Colon, what would have been the result?

If, each of the shippers having cargo on the steamship "Eureka" had demanded a delivery of their particular portions at the Port of Colon, what would have been the result?

There can be but one answer to these questions.

Is it, therefore, proper to enforce a liability in favor of one shipper which could not, under the circumstances, have been enforced in favor of every shipper?

We respectfully suggest that when the rule announced in the present case is viewed from the standpoint of the "Harter Act," and from the viewpoint of its general effect upon carriers, and from the viewpoint of its effect upon the rights of all other shippers, its own injustice and incorrectness is self-apparent and that a rehearing should be granted in this controversy.

Respectfully submitted,

PLATT & PLATT and

HUGH MONTGOMERY,

Proctors for Appellee.